



2020 Annual Conference
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You Think You Know? Understanding the Applicable Law and Duties to Your Insured

Choice of law rules can be complex, especially when it comes to the insurer's duties to defend and settle suits. In August 2019, the California Supreme Court issued a decision impacting when California law applies to the insurer's right to deny coverage due to late notice regardless of a policy express choice of law provision. Other courts around the country, including key jurisdictions like New York, Delaware, Florida, South Carolina and Missouri, have also issued rulings that turn on the nature of the underlying claim or "split" the applicable choice of law (i.e., finding that one state's law applies to interpretation of the insurance policy while another state's law applies to the insurance company's claims-handling obligations). This creates the potential for conflicting duties and can impact key decisions by claim professionals from appointment of counsel through settlement discussions. This session will review some of the key court rulings and key areas of differences in applicable law and discuss how underwriters and claims professionals may be able to influence the outcome of these choice of law challenges.

I. Perils and Pitfalls in Choice of Law Analysis

Claims professionals and coverage attorneys must be aware of the law governing the relevant insurance contract as well as their obligations with respect to defense and settlement. These rules can be complex and may turn on which jurisdiction is deciding the issue. A claims professional does not fully understand the rules of the different jurisdictions may inadvertently waive rights or policy limitations and may also violate their legal obligations to insureds. Such mistakes could jeopardize the insureds' defense and/or increase the insurance company's exposure. Claims professionals must also be prepared to appropriately respond to pressure from policyholder representatives and to avoid complaints to state insurance regulators.

Courts in a number of states have departed from the state's usual choice of law rules or contractual choice of law provisions on the grounds that the substantive issue presented bumps up against important state public policy considerations such that the state policy should control over all other choice of law issues. The most recent example is an August 2019 California Supreme Court ruling in *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93 (2019), which held that California law applies to the insurer's right to deny coverage due to late notice regardless of a policy's choice of law provision. Additional examples arise in areas relating to an insurance company's rights to recovery of defense costs if coverage is not owed, the insurer's duties in

settlement discussions, the scope of coverage for particular types of claims like willful misconduct or particular remedies such as punitive damages or disgorgement.

II. Areas Where Laws May Differ

We will explore differences between different state laws starting with what the insurer is allowed to consider in evaluating coverage and who has the right to appoint defense counsel. For example, a number of states require insurers to look only at the four corners of the pleadings and provide a defense even if the insurer has information that is dispositive of coverage. Other states allow insurers to consider information outside the pleadings *if* such information supports coverage but not if it would support a denial of coverage. For example, California and Utah allow insurers to look at outside information to disclaim coverage while New York and New Hampshire do not.

Additional examples of areas where laws vary include: a) the impact of late notice by an insured; b) types of situations in which an insured must be allowed to select their own counsel as opposed to counsel appointed by the insurance company pursuant to its duty to defend; c) whether and in what circumstances an insurer must pay pre-tender defense costs; d) whether and how an insurer may reserve its right to allocate and/or recoup defense costs attributable to non-covered matters; e) when and to whom a denial of coverage must be issued; f) whether coverage may be afforded by estoppel due to an insurer's failure to comply with local rules; g) how to allocate long-tail loss; h) an insurer's obligations to settle a case including what an insurer may consider in evaluating settlement as well as when and whether the insurer has an obligation to initiate settlement discussions and what happens when the plaintiff makes a demand within limits; i) and the consequence of a good faith but erroneous decision not to settle a case; and j) an insurer's obligations to disclose limits, policy and/or coverage positions.

III. Strategies for Claims Professionals to Influence the outcome of choice of law challenges

We will discuss areas where differences can be outcome determinative and the best way to protect the insurance company's position. For example, it often makes sense to try to bring coverage disputes in federal court where local biases tend to be less pronounced. Nonetheless, claims professionals and their counsel must consider whether it make sense to file a coverage suit early and the consequences of doing so. For example, in New York, if an insurer's coverage position is found to be wrong, the insurance company is liable for the insured's coverage litigation attorneys' fees if the insurer filed the suit as plaintiff (or counterclaims) but not if the insurance company was the defendant in the coverage suit. Policyholders and their representatives also often take the position that once coverage litigation has been filed, they cannot cooperate or share information with the insurer. In sum, it is important for claims professionals to think about the big picture and to be well versed in the law and its variations by jurisdiction so that coverage defenses are properly raised and not waived.

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